United Nations A/HRC/WGAD/2013/13

General Assembly

Distr.: General
14 January 2014
English
Original: French

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-seventh session, 26–30 August 2013

No. 13/2013 (Switzerland)

Communication addressed to the Government on 28 February 2012

Concerning: Mohamed El Ghanam

The Government replied on 30 April 2012.

The State is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, as established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

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(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. This case was submitted to the Working Group on Arbitrary Detention in the following terms.

4. Mohamed El Ghanam, an Egyptian national, was born in 1957. Before leaving Egypt, he was a colonel in the Army and director of the Legal Research Department of the Ministry of the Interior.

5. Mr. El Ghanam's case was submitted to the Working Group on Enforced or Involuntary Disappearances in 2007. On the basis of information submitted by the Swiss Government, the Working Group on Enforced or Involuntary Disappearances decided to consider Mr. El Ghanam's case clarified in 2009.

6. Mr. El Ghanam was granted asylum in Switzerland on 31 July 2001, on the basis of the intimidation he had been subjected to in Egypt for refusing to help fabricate evidence against opponents of the regime of the former President, Mr. Hosni Mubarak.

7. Starting in 2002, Mr. El Ghanam was regularly approached by the Swiss Federal Intelligence Service (FIS), who wanted him to infiltrate Geneva's Muslim community. Mr. El Ghanam refused to cooperate with the Swiss intelligence services and when they persisted filed a series of complaints with the Geneva police in October 2004 and January 2005. He also complained to the Geneva Cantonal Parliament in February 2005. No action was taken on these complaints.

8. The source describes three periods of detention. The first was from 16 February to 21 June 2005, after Mr. El Ghanam was arrested on 15 February 2005 for having threatened and injured a person in the street. The source says that Mr. El Ghanam was charged but was not allowed to produce witnesses to the investigating judge in the case. Moreover, the lawyer assigned to him by the Geneva court advised Mr. El Ghanam to withdraw his complaints against the Federal Intelligence Service. Mr. El Ghanam was placed in pretrial detention at Champ-Dollon prison on 16 February 2005. On 21 June 2005 he was released under a provisional release order from the Indictment Division.

9. The second period of detention was from 10 November 2005 to 1 May 2006. According to the source, an official of the Federal Office of Police wrote to the deputy prosecutor in Mr. El Ghanam's case on 6 October 2005, notifying her of comments made by Mr. El Ghanam that could represent a threat to Switzerland's internal and external security. The official is said to have suggested that he should be hospitalized. After this exchange, Mr. El Ghanam was arrested and forcibly interned in the psychiatric hospital of Belle-Idée, Geneva, on 10 November 2005. Three weeks later an order was given for his transfer to Champ-Dollon prison and he was never given a chance to mount a defence.

10. On 28 April 2006, the Indictment Division refused to extend Mr. El Ghanam's pretrial detention. However, as he was subject to a Federal Council expulsion order, he was placed in administrative detention the same day. By a decision of 1 May 2006, the Cantonal

Asylum Appeal Commission finally decided to lift the administrative detention order and Mr. El Ghanam was released.

11. The third period of detention started on 12 March 2007. On 30 January 2007, the criminal case having been referred back to it by the prosecutor, the Indictment Division ordered Mr. El Ghanam to be detained, on the grounds that he had a psychiatric disorder that could disrupt national security. On 12 March 2007, therefore, Mr. El Ghanam was once again imprisoned in Champ-Dollon, for medical reasons.

12. The source maintains that the decision to detain Mr. El Ghanam was made on the basis of a medical report and yet Mr. El Ghanam had never been examined in person as he had consistently refused to undergo any psychiatric examination. Two hearings were held, on 18 October 2011 and 10 January 2012, to evaluate Mr. El Ghanam's psychiatric condition, but he did not attend.

13. Mr. El Ghanam is still being held in Champ-Dollon prison and is undergoing medical treatment against his will. According to the source, his health is deteriorating.

14. The source contends that Mr. El Ghanam's deprivation of liberty is a result of his refusal to cooperate with the Federal Intelligence Service.

15. The source also argues that Mr. El Ghanam's deprivation of liberty is a violation of the guarantees of a fair and just trial, being based on an evaluation of his psychiatric condition even though he had never agreed to an examination in person. His detention is therefore contrary to article 9, paragraph 1, of the International Covenant on Civil and Political Rights, to which Switzerland is a party, which states that "no one shall be subjected to arbitrary arrest or detention". The Covenant goes on to say that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". Mr. El Ghanam's deprivation of liberty is also contrary to article 14, paragraph 1, of the Covenant, which guarantees that, "in the determination of any criminal charge against him … everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

16. The source also states that Mr. El Ghanam is being held in a prison facility not designed for patients with psychiatric disorders, which is a violation of article 10, paragraph 1, of the Covenant, whereby "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

Response from the Government

17. In its reply dated 30 April 2012, the Government recalls the importance it attaches to the protection of and respect for human rights, without discrimination, and makes reference to the applicable law. It then gives its reply in respect of the three periods of detention that are the subject of the allegations.

18. As regards the first period of detention, the Government maintains that Mr. El Ghanam was arrested on 15 February 2005 for attacking another person with a knife. A detention order was issued on 16 February 2005 for threatening behaviour and attempted murder, and all procedural guarantees were applied. On 21 June 2005 provisional release was ordered by the Indictment Division.

19. The second period of detention can be divided into three stages. First, from 10 to 30 November 2005, involuntary admission to the psychiatric clinic at the request of a physician with a mandate from the Psychiatric Oversight Board; all procedural guarantees provided by law were applied. Secondly, on 21 November 2005, Micheline Spoerri, Cantonal Councillor with responsibility for justice, the police and security, brought a complaint against Mr. El Ghanam for insulting behaviour, attempted coercion or threats; the investigating judge requested a psychiatric examination on 25 November 2005 and

issued a detention order on 1 December 2005. This detention was appealed before the investigating judge and the Indictment Division, and the Indictment Division ordered his release on 28 April 2006. Lastly, that same day, a criminal investigation officer issued an arrest warrant against Mr. El Ghanam based on the law on the residence of foreigners, as a means of enforcing the expulsion decision; on 1 May 2006 the appeals board of the Aliens Registration Office annulled the warrant, and that decision was later upheld appeal by the criminal investigation officer.

20. As to the third period of detention, on 30 January 2007 the Indictment Division ordered the case against Mr. El Ghanam to be dropped on the grounds that he was not liable for the 15 February 2005 incident and, because he was a danger to society, ordered him to be detained in Champ-Dollon prison, where there is a medical service that is run by the University and not by the prison authorities. This detention order is reviewed at regular intervals in accordance with the procedures provided for by law.

21. Based on these arguments, the Government considers itself to be in strict compliance with the provisions of articles 9 and 14 of the International Covenant on Civil and Political Rights; a guardian was appointed on 6 August 2006 to enable Mr. El Ghanam to exercise his rights and legal assistance resumed on 19 July 2011. The Government also states that, according to the specialists assigned to the case, "Mr. El Ghanam is suffering from several conditions, no treatment is possible without his cooperation and detention is necessary to prevent him being a danger to others". Another examination has been ordered but Mr. El Ghanam refuses to cooperate in any way.

Further comments from the source

22. In comments dated 2 May 2012, the source states that, as regards the assault he was accused of, Mr. El Ghanam acted in legitimate self defence. Although his request for four witnesses to be heard by the investigating judge at the hearing of 14 May 2005 was turned down, he acknowledges that during this period (15 February–14 March 2005) procedural safeguards were applied and his detention may be considered lawful.

23. The source goes on to say that government authorities put pressure on the judiciary, as shown by a letter dated 6 October 2005 from the head of the civil intelligence services to the investigating judge, recommending deprivation of liberty for Mr. El Ghanam; a letter dated 25 October 2005 from the Special Investigation Brigade falsely stating that Mr. El Ghanam had stabbed his victim in the abdomen, which had influenced the Psychiatric Oversight Board, whose report had formed the basis for his detention; and a letter of 7 December 2005 from the head of the civil intelligence services to the prosecutor, expressing his concern at the prospect of release under the criminal charges and suggesting enforcement of the decision to remove Mr. El Ghanam, which would entail administrative detention.

24. In the source's view, all this correspondence influenced the course of justice and the use of measures of deprivation of liberty against Mr. El Ghanam.

25. Lastly, the source maintains that, although the courts had had the psychiatric report since July 2006, nothing was done to ensure the defence of Mr. El Ghanam's rights and he was left without a lawyer and without a guardian. He was not called to the hearing of 23 January 2007 and received no notification of the Indictment Division's decision on detention.

Discussion

26. No account can be taken of the claims made above by the source, which were never mentioned until these comments were submitted and were not communicated to the Swiss Government, which was therefore unable to reply.

27. To recap, the claims that have been communicated to the Government are that Mr. El Ghanam is still in Champ-Dollon prison and undergoing treatment against his will, that his detention is a result of his refusal to cooperate with the Federal Intelligence Service, and that the right to a fair trial has been violated inasmuch as detention is based on a psychiatric evaluation even though Mr. El Ghanam refused to be examined.

28. In its reply, the Government states that, even though Mr. El Ghanam refuses to cooperate in his treatment, his rights have been respected; that the grounds for his detention are offences against criminal law and his state of mental health; that the provisions of articles 9 and 14 of the International Covenant on Civil and Political Rights have been observed to the letter insofar as he has had a lawyer, and that this lawyer has had access to his file and has availed himself of all legal remedies, resulting in his client's release on several occasions and a decision not to proceed against him.

29. In addition, the record of the sentence enforcement court hearing of 10 January 2012, as produced by the source, shows that counsel and the guardian were in attendance. The record states that Mr. El Ghanam's lawyer pleaded as follows: "Requests that Mr. El Ghanam be forcibly brought before this court; requests that the court also rule on the lawfulness of detention; states that the conditions for revocation of conditional release from detention and for reintegration have not been met; states that the conditions for therapeutic measures in confinement have not been met given that treatment has failed".

Disposition

30. To all intents and purposes, the above-mentioned extract from the record of the hearing, together with the fact that the source itself confirms the lawfulness of detention between 15 February and 14 March 2005, confirms the Government's reply.

31. Accordingly, the Working Group, on the basis of paragraph 17 (a) of its methods of work, finds that this is not a case of arbitrary detention.

[*Adopted on 26 August 2013*]

United Nations A/HRC/WGAD/2013/14

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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-seventh session, 26–30 August 2013

No. 14/2013 (Burundi)

Communication addressed to the Government on 12 November 2012

Concerning: Mr. Joseph Kalimbiro Ciusi; Mr. Mutambala Swedi Fataki; Mr. Mpahije Félix Kasongo; Mr. Jacques Obengi Songolo and Mr. Maneno Tundula

The Government has not replied.

The State has been a party to the International Covenant on Civil and Political Rights since 9 May 1990.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

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(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Joseph Kalimbiro Ciusi was born in 1948 in Kabare, Democratic Republic of the Congo. He is now resident in the refugee camp at Gasorwe, Q32 C4 M4, Muyinga province, Burundi.

4. Mutambala Swedi Fataki was born in 1961 in Uvira, Democratic Republic of the Congo. He is now resident in the refugee camp at Gasorwe, Q11 C3 M4, Muyinga province, Burundi.

5. Mpahije Félix Kasongo was born in 1974 in Minembwe, Democratic Republic of the Congo. He is now resident in the refugee camp at Gasorwe, Q9 C4 M2, Muyinga province, Burundi.

6. Jacques Obengi Songolo was born in 1980 at Sange, Democratic Republic of the Congo. He is now resident in the refugee camp at Gasorwe, Q1 C3 M11, Muyinga province, Burundi.

7. Maneno Tundula was born in 1948 in Kabare, Democratic Republic of the Congo. He is now resident in the refugee camp at Gasorwe, Q9 C3 M11, Muyinga province, Burundi.

Events leading up to the authors' arrest

8. Fleeing from the civil war in the Democratic Republic of the Congo, the authors arrived separately in Burundi between 2000 and 2007 and applied for asylum, and were placed in the refugee camp at Gasorwe, Muyinga province, Burundi.

9. The inadequate living conditions in the Gasorwe refugee camp prompted Mr. Swedi Fataki to set up the Association for the Rights of Refugees in Burundi (ADR), which was registered with the Bujumbura notary public on 1 May 2009.

10. According to article 4 of the Constitution of ADR:

"The purpose of the Association is to defend the rights of refugees by means of specific measures.

"Specific aims

"1. Identify all refugees, wherever they are, in order to ascertain their concerns.

2. Inform refugees, wherever they are, to enable them to recognize themselves as refugees and understand their rights and obligations in respect of the country of asylum.

3. Raise refugees' awareness of their rights by organizing training seminars, workshops, conferences and cultural activities, for example.

4. Assist refugees in seeking and maintaining friendly relations among themselves and with nationals of the country of asylum.

5. Peacefully defend refugees' rights through dialogue and negotiation, as well as peaceful demonstrations.

6. Raise refugees' awareness of development projects, notably in the areas of education, health and occupations of various kinds.

7. Raise public awareness, at the national and international levels, of how refugees live, by means of published material." (Bujumbura notary public, register entry No. M/2625/2009, deposit of minutes, 1 May 2009.)

11. Mr. Swedi Fataki is still the chair and legal representative of the Association, Mr. Tundula is responsible for public relations, Mr. Kasongo is the adviser and Mr. Songolo the coordinator. Mr. Kalimbiro Ciusi is a member of ADR.

12. By a letter dated 5 September 2009, Mr. Swedi Fataki, on behalf of ADR, informed the Administrator of the Gasorwe camp of the formation of the Association.

13. On 28 September 2009, ADR was granted a "certificate of recognition for administrative purposes" by the Administrator of the urban municipality of Bwiza. Recognition permits the Association to carry out its activities in that municipality.

14. The certificate is valid for three months and was renewed on 22 December 2009, 11 March 2010, 15 June 2010, 14 September 2010 and 14 December 2010. The period of validity of the latest certificate was not specified.

15. By letter of 7 December 2009 to the Ministry of the Interior of Burundi, Mr. Swedi Fataki, acting on behalf of ADR, requested the Association's accreditation in Burundi.

16. At that time, the activities of ADR consisted primarily in reporting offences by members of the public and the local police against refugees to the camp Administrator and the representative of the Office for Refugees and Stateless Persons (ONPRA) in Muyinga.

17. At that time the Association had de facto recognition within the refugee camp, as shown by the fact that exit passes were regularly issued to ADR members by the Gasorwe camp Administrator. These passes explicitly stated that exit from the camp was authorized for "ADR business".

18. On 13 June 2010, the legal representative of ADR wrote on behalf of the Association to the United Nations High Commissioner for Refugees to report acts of violence of various kinds by the local population, and condoned by the Burundian police, against Congolese refugees, and misappropriation of the refugees' food rations by the Gasorwe camp Administrator.

19. By letter dated 15 November 2010, Mr. Swedi Fataki, in his capacity as legal representative of ADR, notified the President of the Republic of the difficulties ADR was encountering in its work.

20. By letter of 29 December 2010, Mr. Swedi Fataki, on behalf of ADR, notified the Minister of Security in Burundi of various complaints regarding the security situation of refugees in Burundi. The letter recounts incidents of murder, sexual violence, bodily injury and arbitrary arrest against refugees in the Gasorwe camp and accuses the commander of the camp police of condoning or committing these offences. The letter also expresses the Association's concern at the harassment of its members and complains of "anonymous notices sent to members of ADR Burundi in the camp hinting at the possibility of abductions".

21. On 31 January 2011, the legal representative of ADR complained to the Office for Refugees and Stateless Persons (ONPRA) that spoiled food had been distributed to refugees in the Gasorwe camp and that the Administrator had misappropriated food and an amount of $7,500 intended for the refugees in the camp.

22. Despite the various complaints contained in these letters, the authorities did not investigate any of the allegations of violence and several members of ADR were summoned to the Muyinga prosecutor's office.

23. The increasing number of summonses received by ADR members prompted the Association to issue a communiqué on 7 February 2011 containing the following demands:

> "Henceforth all summonses in connection with reports by the Association for the Rights of Refugees in Burundi (ADR) should be addressed to the Association (legal person) and not to an individual (physical person);
>
> "Any summons addressed to a refugee should be brought either by the police or by the director of the camp, through the [Office of the United Nations High Commissioner for Refugees (UNHCR)] (our protector) and not by another refugee;
>
> "ADR is prepared to respond to any summons from an administrative authority but requests that transport and security for ADR members who have been summoned should be provided by ONPRA and UNHCR;
>
> "The accused should receive the summons one week before the date set for the hearing, not the day before. By way of example, a summons from the Muyinga prosecutor's office dated 26 October 2010 and brought by a refugee was delivered to the person concerned at 7 p.m. on 2 November 2010, yet they were required to be at the Muyinga prosecutor's office, 30 km from the Gasorwe refugee camp, at 9 a.m. on 3 November 2010."

24. No reply having been received to the application for accreditation submitted to the Burundian Minister of the Interior on 7 December 2009, the legal representative of ADR sent another request by letter dated 24 February 2011.

Arrest and detention of the petitioners

25. On 28 March 2011, Melchior Sindayihebura, head of the Muyinga branch of ONPRA, lodged a criminal complaint against Mr. Swedi Fataki with the prosecutor at the Muyinga *tribunal de grande instance* (court of major jurisdiction).

26. The complaint alleged a violation of article 602 of the Criminal Code, on internal State security, whereby:

> "Anyone who
>
> "1. Publicly challenges the binding nature of laws or directly incites others to disobey the law;
>
> "2. Knowingly spreads false rumours likely to alarm members of the public or set them against the Government, or incite civil war;
>
> "3. In order to disturb the peace, knowingly participates in the publication, dissemination or reproduction by any means, of false news or of news items that have been fabricated, forged or are falsely attributed to third parties; or
>
> "4. Exhibits or causes to be exhibited in public places or places open to the public, drawings, posters, prints, paintings or photographs, or any other object or image likely to cause a breach of the peace;

> "Shall be liable to 2 months' to 3 years' imprisonment and/or a fine of 50,000 to 200,000 francs."

27. According to the complaint, the sole purpose of article 5 of the Association's statutory aims (see paragraph 10) was to "set the refugees against the Government of Burundi, the Office of the United Nations High Commissioner for Refugees and other partners by means of marches and demonstrations".

28. According to the head of the ONPRA branch office, ADR's aims conflict with the host Government's mission and with the 1951 Geneva conventions, which recognize UNHCR and the host country Government as the only bodies authorized to defend refugees' rights.

29. At around 3 p.m. on 30 March 2011, a Muyinga police van arrived at Mr. Swedi Fataki's home. On their arrival the police beat Mr. Swedi Fataki and then took him and the other four authors of this communication to the Muyinga police station.

30. They were charged with breach of internal State security (Criminal Code, art. 602) and imprisoned for 3 weeks in a cell measuring about three metres by four, with some 20 other detainees. According to another member of ADR, the detainees were beaten and tortured during their imprisonment. They were then transferred to Ngozi prison, a facility with 400 places that now holds 1,828 prisoners, 871 of them in pretrial detention.

31. On 3 May 2011 ADR issued a communiqué condemning the arrest of five of its members and complaining that the safety of members of ADR in the Gasorwe refugee camp was now at risk. It also stated that the detainees had not been brought before the Burundian courts since their arrest on 30 March 2011.

32. In a letter to the President of the Muyinga court of major jurisdiction, dated 15 May 2011, the detainees requested immediate conditional release. They recalled that, under article 15 of the Convention relating to the Status of Refugees of 28 July 1951, ratified by Burundi on 19 July 1963:

> As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

33. The letter goes on to give a detailed description of the procedure followed by ADR in applying for accreditation in Burundi, in accordance with the requirements of Burundian domestic law, and shows how the public statements of ADR had done no more than assert rights recognized by the Convention relating to the Status of Refugees.

34. The letter also states that, six weeks after their arrest, the detainees had still not seen their file or the criminal complaint on which their arrest was based.

35. On 16 June 2011, the detainees' wives wrote to UNHCR in Burundi complaining that their husbands had still not been assigned a lawyer to defend them. They also stated that Gasorwe refugee camp would not issue them with exit passes in order to visit their husbands in prison. They were obliged to sell food in order to buy exit passes, though these are normally free of charge. Not until several months later was a lawyer appointed, after an NGO intervened.

36. The first public hearing on the case took place on 14 October 2011 at the Muyinga court, that is to say six and a half months after their arrest. The same day, the proceedings were adjourned for consideration.

37. By letter dated 17 October 2011, the lawyer for the authors of this communication, Mr. Amédé Nzobarinda, requested acquittal of the detainees or, in the alternative, conditional release, on the following grounds:

- The unlawful nature of the detainees' arbitrary detention;
- The lack of any evidence of the detainees' guilt: the prosecution relied chiefly on the fact that ADR was not an accredited organization and had not demonstrated the guilt of individual detainees;
- The court's refusal to hear the witnesses called by the accused or to admit the evidence for the defence that they wished to produce;
- The arbitrary application of article 602 of the Criminal Code to the accused;
- The court's lack of jurisdiction in the matter of accreditation of ADR, which is an administrative, not a criminal, procedure (Note to the court dated 17 October 2011).

38. In ruling RP 5896 of 30 January 2011, the Muyinga court sentenced the detainees to 3 years' imprisonment for breach of internal State security.

39. The ruling made the following findings in respect of the detainees:

- The court finds a breach of internal State security by the accused inasmuch as they wrote several things that discredit several of the country's authorities and various senior officials of UNHCR in the name of an association that has never been accredited by the Minister; Mr. Kasongo himself stated at the hearing that they had submitted an application but were still awaiting a reply;
- The purpose of all the letters written by the accused was to incite the refugees to revolt and to terrorize the local people living near the camp. They also wrote that refugees are raped and tortured by security officers and that no one puts a stop to it.

40. On 26 June 2012, counsel appealed the judgement. A hearing was scheduled for 5 July 2012 in the Ngozi appeal court but was postponed because the case file had not yet been transferred there.

Arbitrary nature of the detention and manifest impossibility of invoking any legal basis justifying the deprivation of liberty

(a) Detention while awaiting trial

41. The Burundian Code of Criminal Procedure defines police custody as "holding a person on specified grounds and for a specified period, at the place of arrest or in a police station, as required for the purposes of a criminal or judicial investigation" (Code of Criminal Procedure, art. 58, para. 1).

42. Police custody may not exceed 7 days counted from hour to hour, except where an extension is deemed essential, as determined by the public prosecutor's office and up to a maximum of twice that period (Code of Criminal Procedure, art. 60, para. 1). Any placement in police custody must be duly recorded in a police custody report by the responsible criminal investigation officer (Code of Criminal Procedure, art. 61, para. 1).

43. Under article 71 of the Code of Criminal Procedure, a person cannot be placed in pretrial detention unless there is sufficient evidence against them, the acts they are accused of appear to constitute an offence punishable by law by at least 1 year's imprisonment (para. 1), and pretrial detention is the only means of preventing collusion, maintaining public order, protecting the accused, halting the offence or preventing repetition of the offence, or ensuring that the accused remains at the court's disposal (para. 2).

44. Under article 72 of the Code of Criminal Procedure, where the criteria for pretrial detention are met, the public prosecutor's office may issue a provisional arrest warrant (para. 1). No more than 15 days after the issuance of the warrant, the person in provisional detention must be brought before a court and the court must place them under arrest or release them (para. 2). The court must rule within 48 hours on whether pretrial detention is to continue or the accused is to be released (Code of Criminal Procedure, art. 73).

45. Lastly, article 75 of the Code of Criminal Procedure provides that "the order authorizing pretrial detention is valid for 30 days including the date of issue. On expiry of this period, pretrial detention may be extended by a reasoned decision on a month-by-month basis, for as long as the public interest requires." According to the Supreme Court of Burundi, if the public prosecutor's office does not submit a request within 30 days, as provided under article 75 of the Code, the request for extension of the pretrial detention order is inadmissible and the detainees should be given provisional release.

46. In this case, the authors of the communication were arrested on 30 March 2011. No custody report was drawn up, no provisional arrest warrant was issued and the detainees were not brought before the court until the 14 October 2011 hearing at the Muyinga court, which dealt solely with the merits of the case and not the provisional detention of the accused.

47. Thus the 6-month, 14-day detention between 30 March and 14 October 2011 was unlawful as it had no legal basis. After the maximum period of custody of 7 days, a provisional arrest warrant ought to have been issued and the detainees should have been brought before the court within 15 days after that. The public prosecutor's office should then have requested extension of provisional detention every 30 days.

48. In view of the complete disregard for the rules of procedure governing police custody and pretrial detention, the source asks the Working Group to find the detention of the authors of this communication, between 30 March 2011 and their conviction on 30 January 2012, unlawful and thus arbitrary, in violation of article 9 of the International Covenant on Civil and Political Rights.

(b) Detention after the judgement of 30 January 2012

49. To begin with, the source points out that the criminal complaint lodged on 28 March 2011 was solely against Mr. Swedi Fataki, who, as legal representative of ADR, had signed all the letters and communiqués referred to in the complaint, with the exception of the 11 February 2011 communiqué, which was signed only "ADR/Burundi".

50. The communiqué of 11 February 2011, described in the complaint as inciting refugees not to answer summonses from the prosecutor's office, merely asked the authorities to ensure that, firstly, summonses from the prosecutor's office that concern ADR should be addressed directly to the Association and not to its members, and secondly, that any summons addressed to a refugee should be delivered to them in person by the relevant authority at least one week in advance and not by other refugees from the Gasorwe camp.

51. In addition, the Muyinga court stated in the background section of the judgement that:

- Mr. Songolo had insulted the Administrator of the Gasorwe camp and threatened him with death;
- Mr. Kasimbiri Ciusi and Mr. Kasongo had forced their way into the camp Administrator's office and threatened him.

52. However, judgement RP 5896 of 30 J... ...v 2012 gives no legal analysis of these criminal acts and simply sentences all the accused for breach of internal State security.

53. As the judgement puts it, "a breach of internal State security was committed by the accused inasmuch as they wrote several things that discredit several of the country's authorities and various senior officials of UNHCR ... in the name of an association that has never been accredited by the Minister".

54. In fact Mr. Swedi Fataki is the sole author of the letters referred to in the judgement and the judgement fails to demonstrate in what way his fellow detainees were involved in writing the letters and communiqués.

55. Indeed, if the letters and communiqués did in fact constitute a breach of internal State security, the Muyinga court, to judge by its reasoning in the paragraph quoted above, seems to believe that all members of ADR, and not just his four fellow detainees, are responsible for the actions taken by Mr. Swedi Fataki on behalf of ADR.

56. The Muyinga court failed to analyse the individual responsibility of each of the accused. The court should have established to what extent and in what capacity (perpetrator, participant, accomplice, etc.) each accused was supposed to have been involved in the offence of breach of internal State security and handed down a reasoned decision demonstrating each one's guilt.

57. Instead of properly identifying the perpetrators of the offence, the court jumped to the conclusion that all of them — apparently in their capacity as members of ADR — were responsible for the breach of internal State security.

58. The source contends that nothing in the letters and communiqués cited can be interpreted as a breach of State security within the meaning of article 602 of the Criminal Code.

59. According to the source, the judgement contains no proper discussion of the offence and no explanation of how the letters and communiqués represented a breach of Burundi's internal security, and makes only the following statements:

- The prosecutor went on to say that the accused had formed an association known as ADR (Association for the Rights of Refugees in Burundi) for the purpose of disrupting security and giving national and international public opinion to understand that refugees in Burundi lived in appalling conditions;
- The prosecutor went on to say that, in communication No. ADR/BDI/016/2010 of 13 June 2010, as published on the website www.refugeespace.net, and addressed to the Minister of Security, the Minister of the Interior and accredited ambassadors in Burundi, the accused, on behalf of their association, stated that Burundi had knowingly allowed into the country food that was no longer edible, given to the refugees by the World Food Programme (WFP);
- The prosecution went on to say that in communication No. ADR/BDI/023/2010 of 15 November 2010, all persons mentioned on the website www.refugeespace.net, the accused stated that the Gasorwe refugee camp was sheltering Rwandan soldiers;
- The prosecution then stated that according to that communication, in refugee camps in Burundi, rape, crimes and acts of torture were committed in front of protection officials, who did not put a stop to them;
- His counsel, Mr. Amédé Nzobarinda, requested, through the court, that the prosecution clearly states what offences had been committed and the dates of the communications;

- The public prosecutor replied that the documents they had written were on file and that the court could verify the letter from ADR stating that the Gasorwe camp comprised ex-combatants from Rwanda, which had created a bad atmosphere between Rwanda, the Democratic Republic of the Congo and Burundi;
- The public prosecutor then stated that ADR had written that Burundi handed out food that was no longer edible;
- The court checked the file and found several letters, including communication No. ADR/CG/BDI/014/2010, addressed to the UNHCR Representative, with supporting photographs attached. ADR argued in this letter that their safety was at risk, that the camp representatives were corrupt, that WFP was handing out spoiled beans, that in 2009 a Mr. Byamungu had been tortured by a head of unit, that refugees were beaten by security officials in broad daylight, that the representatives were aware of the situation and that photographs had been taken as evidence. ADR also mentioned the inadequacy of medical care and stated that the doctor did not pay attention to patients during consultations, which had led to the deaths of several refugees;
- The file also contained a letter from ADR dated 16 June 2010, which revealed that on 10 April 2010, at the Ruyigi provincial market, a refugee named Tutu Mwari had been robbed by some of the local residents, that the chief of the refugees knew about it and that nothing had been done to restore the stolen goods to the victim. A woman had been severely beaten by locals and nothing had been done about it, even though the authorities had been told, as they had been told about other incidents of violence against refugees, committed either openly in front of security officers, or by the officers;
- The file also contains a letter from ADR to the President of Burundi stating that refugees' food was being misappropriated, and that refugees were tortured and killed in front of security officers.

60. The source states that these points do not constitute a violation of article 602 of the Criminal Code as they do not incite anyone to break Burundian law (art. 602, para. 1), attack the country's authorities (para. 2) or disturb the peace (para. 3). According to the source, the judgement completely fails to show in what way these letters and communiqués constitute a violation of article 602 of the Criminal Code.

61. The Muyinga court nevertheless sentenced the five representatives of ADR to the maximum prison sentence provided for in article 602 of the Criminal Code.

62. In view of the lack of any reasoning or precise and relevant legal analysis regarding the guilt of each of the accused, the source requests the Working Group to find that it is clearly impossible to invoke any legal basis justifying the detention of the authors of the communication.

Arbitrary nature of the detention arising from the exercise of the right to freedom of expression

63. Under article 19, paragraph 2, of the Covenant, "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

64. In this case, judgement RP 5896 of 30 January 2012 finds that "an offence of breach of internal State security was committed by the accused inasmuch as they wrote several things that discredited several of the country's authorities and various senior officials of UNHCR".

65. The letters and communiqués cited in the criminal complaint and the judgement are signed only by Mr. Swedi Fataki on behalf of ADR.

66. With the exception of the letter of 15 November 2010, which discussed the difficulties encountered by ADR in the accreditation procedure, and which was copied to the press, all the letters about the situation of refugees in Burundi were addressed only to the relevant competent authorities and representatives of the international community.

67. The letters contained factual exposés of the concerns of ADR with regard to the refugees in Gasorwe camp and were intended to alert the authorities in the hope that they would take steps to improve refugees' living conditions.

68. These actions are consistent with article 7 of the ADR Constitution, which gives one of the aims of the Association is to "raise public awareness, at the national and international levels, of how refugees live, by means of published material".

69. Here it should be recalled that ADR did everything possible to obtain accreditation. In addition to having its Constitution notarized, repeatedly being granted certificates of recognition, and notifying the Gasorwe refugee camp Administrator in writing, ADR applied to the Minister of the Interior for accreditation in letters dated 7 December 2009 and 24 February 2011.

70. The Minister of the Interior never replied to the applications for accreditation, yet he could perfectly well have expressed reservations with regard to article 7 of the ADR Constitution. The source asks the Working Group to find that, in its letters and communiqués, ADR was merely exercising its right to freedom of expression, as guaranteed by article 19, paragraph 2, of the Covenant. Detention of the Association's members on the basis of the exercise of that right is therefore arbitrary.

Arbitrary nature of detention based on failure to apply international standards on the right to a fair trial.

71. The source quotes the first sentence of article 14, paragraph 1 [of the Covenant, which] guarantees in general terms the right to equality before courts and tribunals … The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination … The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant (Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 7, 8 and 13).

72. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges ... and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the Constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them (general comment No. 32, para. 19).

73. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is

incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation ... The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other (general comment No. 32, paras. 19, 21).

74. By a note to the court dated 17 October 2011, counsel for the accused protested to the Muyinga court that, at the 14 October 2011 hearing, the judge had refused to hear the witnesses called by the accused or to admit their evidence for the defence. Notwithstanding the seriousness of these allegations, the judgement finds merely that "counsel's note carries no weight, as everything he says has already been debated in court and a solution has been found by the public prosecutor's office".

75. This rejection by the court is a clear violation both of the principle of equality of arms and of article 14, paragraph 3 (e), of the Covenant.

76. Under article 14, paragraph 2, of the Covenant, "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". In this regard, the Human Rights Committee has explained that "the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle" (general comment No. 32, para. 30).

77. The lack of reasoning in this judgement and the nonchalance with which it convicts all the accused of breach of State security without showing, for each one, how the facts amount to a violation of article 602 of the Criminal Code, constitutes a violation of article 14, paragraph 2, of the Covenant, since their guilt has not been proved beyond reasonable doubt.

78. In addition, article 14, paragraph 3 (d), of the Covenant provides that the State must assign legal assistance to accused persons if they do not have sufficient means to pay for it. In this case, the accused were arrested on 30 March 2011. In a letter dated 15 May 2011, having had no access to counsel, they requested provisional release and pointed out that they had still not had access to their file.

79. On 16 June 2011, that is to say 78 days after their arrest, the accused's wives wrote to UNHCR pointing out that the accused had still not had access to a lawyer. It was only thanks to action by Avocats sans frontières (Lawyers without Borders) that counsel was finally appointed to defend their interests.

80. However, action by a lawyer in the days following their arrest could have prevented the violation of the pretrial detention procedure (Code of Criminal Procedure, arts. 71–73, 75 and 77). This should be deemed a further violation, of article 14, paragraph 3 (d), of the Covenant.

81. Lastly, article 130 of the Code of Criminal Procedure provides that "judgements shall be handed down two months after the end of the hearings at the latest". According to the Human Rights Committee, "an important aspect of the fairness of a hearing is its expeditiousness. While the issue of undue delays in criminal proceedings is explicitly addressed in paragraph 3 (c) of article 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in paragraph 1 of this provision. Where such delays are caused by a lack of resources and chronic underfunding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice ...

What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities ... This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal" (general comment No. 32, paras. 27, 35).

82. Here, although the case was adjourned for consideration at the hearing of 14 October 2011, judgement was not handed down until 30 January 2012, that is, 3 months and 16 days later. Thus judgement was rendered with undue and unjustifiable delay within the meaning of article 14, paragraph 3 (c) of the Covenant. For these reasons the source submits that the rules of fair trial were violated in these proceedings, and that detention was therefore arbitrary in nature.

Response from the Government

83. The Working Group regrets that the Government has not replied to the communication and provided information on the allegations it contains.

Further comments from the source

84. The Working Group has asked the source several times for further information, including on the current situation of the persons concerned and notably those who are in detention, but the source has not replied. The Working Group would have liked the source to provide information in particular on the hearing mentioned in paragraph 39.

Discussion

85. The Working Group considers that it is in a position to consider the case in accordance with its methods of work.

Disposition

86. The Working Group decides to keep the case pending until further information is received from the Government and the source, in accordance with paragraph 17 (c) of its methods of work.

[*Adopted on 26 August 2013*]

United Nations A/HRC/WGAD/2013/15

General Assembly

Distr.: General
14 January 2014
English
Original: French

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-seventh session, 26–30 August 2013

No. 15/2013 (Comoros)

Communication addressed to the Government on 1 November 2012

Concerning: Mohamed Amiri Salimou

The Government has not replied to the communication.

The State is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights pursuant to resolution 1991/42. The Commission then clarified and extended the Working Group's mandate by resolution 1997/50. The Human Rights Council assumed the Working Group's mandate in its decision No. 2006/102 and extended it for a further three-year period by resolution 15/18 of 30 September 2010. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or any other status and aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Mohamed Amiri Salimou, born on 6 August 1962, joined the Comorian army in 1988, occupying various posts in the military hierarchy before becoming the first general of Comoros in 2008. He underwent extensive training in France, Senegal, the United States of America and China. He also has an advanced degree in modern history from the University of Montpellier, France.

4. According to the source, he worked to improve operations and introduced the culture of a professional republican army. In his role as Chief of Staff, he chaired the meetings and headed up the commands of the Eastern African Standby Brigade (EASBRIG).

5. On 31 August 2010, Mr. Salimou was summoned to give testimony in an investigation into the murder of Lieutenant-Colonel Combo Ayouba on 13 June 2010 by unknown persons, who have still not been identified. Mr. Salimou was charged and placed under house arrest and judicial supervision. He was deprived of his liberty without a fair trial. The source alleges that Mr. Salimou was wrongly accused of being an accomplice in the murder of Mr. Ayouba on the basis of articles 44, 45 ff. of the Criminal Code.

6. During the year-long investigation, Mr. Salimou was given only one hearing by the investigating judge, and no confrontation between him and the other accused persons was organized. According to the source, the sole aim of this deliberate obstructionism was to prevent the establishment of Mr. Salimou's innocence. The source maintains that the investigation was not intended to collect evidence for both the prosecution and the defence. There is no evidence establishing a link between Mr. Salimou and the murder of Mr. Ayouba.

7. The judgement of the Moroni indictments chamber, handed down on 28 April 2011, referred the case against Mr. Salimou for aiding and abetting a murder to the assize court. None of the suspects accused him of having instructed them to commit the crime or given them the means to do so, and no ballistics report was produced. None of the necessary tests were carried out on the weapon seized at the military camp in Kandani, an AK-47, although they would have determined conclusively whether the weapon had been used in the crime. Under these circumstances, the source argues that it is materially impossible to contend that Mr. Salimou played a role in supplying the weapon used to commit the murder.

8. The appeal in cassation was lodged on 12 May 2011. The appeal in cassation against the indictment order and referral of the former chief of staff to the assize court was dismissed by the Criminal Division of the Supreme Court. The source maintains that the indictments chamber disregarded grounds for nullity raised by the defence and refused to acknowledge the shortcomings of the investigation, particularly the authorities' failure to make an effort to gather evidence for the defence and the lack of a ballistics report. The Supreme Court ruled that the appeal lodged against the judgement of the indictment chamber was inadmissible on the sole ground that the five-day period established by law for the filing of an appeal had elapsed, even though article 217 of the Code of Criminal

Procedure provides that the public prosecutor must inform the accused of the existence of an indictment order within three days of its issuance. The source refers to relevant jurisprudence, according to which non-compliance with the three-day period provided for in article 217, paragraph 3, is not grounds for rendering the judgement null and void, but simply pushes back the starting date of the period allowed for lodging an appeal in cassation. The source notes that the public prosecutor never informed either the accused persons or their legal counsel of the order issued by the indictments chamber.

9. On 4 July 2012, the Supreme Court upheld the indictment procedure, which, according to the source, was marked by serious irregularities. Mr. Salimou was to be tried by the assize court on 1 November 2012. The source feared that the only purpose of the proceedings was to eliminate a political rival and that the judiciary would be unable to withstand the pressure brought by the executive branch and fend off its interference.

10. The source stresses that neither the Criminal Code nor the Code of Criminal Procedure provides for the use of "house arrest" or "judicial supervision", to which Mr. Salimou has been subjected since 31 August 2010, as criminal sanctions. Mr. Salimou remains under judicial supervision in the administrative building where he previously lived with his family. He is under military guard and is deprived of all contact with the outside world, with the exception of visits from his lawyers. The source maintains that this type of detention, which is not provided for in any legislation, is arbitrary in nature. The source argues that, as a result, Mr. Salimou's detention is in violation of article 9 of the International Covenant on Civil and Political Rights and article 9 of the Universal Declaration of Human Rights.

11. Lastly, the source argues that the arbitrary nature of Mr. Salimou's detention arises from serious violations of his right to a fair trial, particularly the failure to make an effort to gather evidence for the defence and the lack of evidence against him and of a ballistics report.

Response from the Government

12. On 1 November 2012, the Working Group transmitted these allegations to the Government and, in accordance with paragraph 15 of its methods of work, requested it to reply within 60 days. The Working Group reminded the Government that it could request an extension of the deadline if it had good reason for doing so.

13. The Government has not responded to this communication.

Discussion

14. The Working Group has been informed that Mr. Salimou was acquitted by the assize court on 1 November 2012 on the grounds of insufficient evidence in the case of the murder of Mr. Ayouba. Mr. Salimou was released and pensioned off.

Disposition

15. In the light of the above, the Working Group renders the following opinion:

> The Working Group decides to close the case concerning Mr. Salimou's detention without deciding whether or not the detention was arbitrary, in accordance with paragraph 17 (a) of its methods of work, in view of the fact that it has been notified that this person has been released.

16. The Working Group requests that the Government reply to its communications in future.

[*Adopted on 26 August 2013*]

United Nations A/HRC/WGAD/2013/16

General Assembly

Distr.: General
1 April 2014
English
Original: Spanish

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-seventh session, 26 to 30 August 2013

No. 16/2013 (Panama)

Communication addressed to the Government on 17 April 2013

Concerning Oscar Pompilio Estrada Laguna and Norberto Monsalve Bedoya

The Government has not replied to the communication from the Working Group.

The State is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in Council resolution 15/18 of 30 September 2010. In accordance with its methods of work (A/HRC/16/47, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis for the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. According to the source, Oscar Pompilio Estrada Laguna, a Nicaraguan national, and Norberto Monsalve Bedoya, a Colombian national, both of whom have been residents of Panama since 2004, have been detained in the Migrant Shelter for Men (an administrative holding centre run by the National Migration Service) in Ancón district since 18 January 2013 and 18 October 2012 respectively.

4. The source reports that these individuals hold refugee status in Panama (granted to Mr. Estrada Laguna through resolution No. 85 of 9 June 1985 and to Mr. Monsalve Bedoya through resolution No. 1254 of 21 December 2005). Both individuals were convicted of offences that the source does not consider to be particularly serious and were given prison sentences, which they have already completed. Nevertheless, they remain in detention pending deportation to their countries of origin, in violation, according to the source, of the principle of non-refoulement (not being returned to one's country of origin).

5. The source states that the conditions in the Migrant Shelter for Men run by the National Migration Service in Ancón district are unhygienic and unsanitary, and that the two individuals are ill and are unable to obtain the medical and psychological care they need. Mr. Monsalve Bedoya has allegedly suffered a heart attack, has experienced high fevers, suffers from an inflammation of the prostate and shows symptoms of severe depression with recurring thoughts of suicide.

6. The source maintains that although the two individuals fully served the sentences handed down to them, they were not released at the end of their prison terms but were instead placed in administrative detention under the custody of the National Migration Service within the Ministry of the Interior and Justice.

7. According to the source, the right of these individuals to due process in the administrative proceedings relating to their expulsion has been seriously undermined by the fact that they have not been informed of the reasons why they are being kept in detention, and have not been allowed to exercise their rights of defence and appeal. They have not been allowed to exercise their right to appeal the deportation decisions.

8. The source also considers that there has been a violation of the principle of equality of nationals and foreigners before the law, given that a double penalty has been imposed against the two foreigners — the criminal conviction and the administrative deportation measure — which constitutes double punishment and discrimination against foreigners. This violates article 26 of the International Covenant on Civil and Political Rights, to which Panama is a party.

9. According to the source, the detention of these individuals is arbitrary and also violates article 9 of the International Covenant on Civil and Political Rights, as it is legally unfounded. It also violates articles 12 and 13 of the Covenant, which guarantee liberty of movement and the right to appeal a deportation order before the competent authority. A

foreigner can be expelled from the national territory only when the legal procedures have been followed and for compelling reasons of national security or public order, which have not been demonstrated in the present cases. The source adds that the refugee status of these individuals has not been respected.

10. The source considers that the 1951 Convention relating to the Status of Refugees has also been violated, as its provisions have been interpreted restrictively, particularly article 33, paragraph 2. Articles 72, 73 and 74 of Executive Decree No. 23 of 10 February 1988 on asylum procedures have also been violated.

11. The source adds that the violation of article 32 of the Constitution, which guarantees respect for due process, is particularly serious.

Response from the Government

12. More than four months have elapsed since the communication was transmitted to the Government, and it has still not provided the requested information. The Working Group is therefore authorized to render an opinion (in accordance with paragraph 15 of its methods of work) without any further consultations with the source.

Discussion

13. In the light of the Government's silence, the Working Group considers that Mr. Estrada Laguna, a Nicaraguan national, and Mr. Monsalve Bedoya, a Colombian national, both of whom are residents of Panama, obtained refugee status in the State of Panama, as governed by the Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, to which Panama acceded on 2 August 1978.

14. It is also taken to be true that both refugees committed an offence that they described as "not particularly serious". In fact, the Working Group has been informed that they were convicted of sexual offences, although neither the source nor the Government has specified what those offences were. However, Mr. Monsalve Bedoya was convicted of another offence which the source also fails to specify, and for which he has also completed his sentence.

15. The source does not call into question the prosecution of these individuals or the sentences handed down to them, but rather the fact that they remain in detention despite having completed their sentences.

16. Ever since the day they completed their terms of imprisonment, their deprivation of liberty has lacked any legal basis and therefore constitutes arbitrary detention under category I, as defined in the Working Group's methods of work.

17. The fact that they are being detained without any legal basis, without any legal charges brought against them and solely by means of an administrative order against which they have not been able to defend themselves, claim or establish their innocence or avail themselves of legal remedies, constitutes arbitrariness of such gravity as to fall within category III as defined in the Working Group's methods of work.

18. The source's greatest complaint is that the authorities have threatened to deport these individuals to their respective countries of origin.

19. The Working Group understands that the refugee status held by both individuals in Panama must have been granted on the grounds that each individual, in his country of origin, had a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion ... and is unable or ... unwilling to avail himself of the protection of that country" (Convention relating to the Status of Refugees, art. 1 A (2).

20. The Government has not contested this claim made by the source.

21. Nor is there any criminal record suggesting that the individuals have "committed a crime against peace, a war crime, or a crime against humanity" (Convention relating to the Status of Refugees, art. 1 F (a)), or have been "guilty of acts contrary to the purposes and principles of the United Nations" (art. 1 F (c)), or have committed a serious non-political crime outside the country of refuge prior to admission to that country as refugees, which would have made it impossible to grant them refugee status in accordance with the above-mentioned Convention.

22. Moreover, Mr. Estrada Laguna and Mr. Monsalve Bedoya have been detained with a view to deporting them to their countries of origin in violation of the principle of non-refoulement, which is strictly prohibited under article 33 of the Convention relating to the Status of Refugees.

23. Accordingly, the deprivation of liberty of Mr. Estrada Laguna and Mr. Monsalve Bedoya, from the day when they completed the sentences handed down for the offences of which they were legally convicted until the date of adoption of this opinion, is arbitrary.

Disposition

24. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Oscar Pompilio Estrada Laguna and Norberto Monsalve Bedoya, from the day on which they completed the sentences handed down for the offences of which they had been legally convicted, is arbitrary under categories I and III as defined in the Working Group's methods of work, as it is clearly impossible to invoke any legal basis that would justify it, and as they have been unable to avail themselves of legal or other remedies to secure their release.

25. The Working Group therefore recommends that Panama immediately release Mr. Estrada Laguna and Mr. Monsalve Bedoya.

26. The Working Group also considers that the Government must guarantee to these individuals that they will not be deported to their countries of origin or to any other country where their life, physical and mental integrity or freedom may be in danger.

27. The Working Group also considers that effective compensation should be granted for the damages caused by their deprivation of liberty as from the day on which they completed the sentences handed down to them, that is, from 18 January 2013 in the case of Oscar Pompilio Estrada Laguna and from 18 October 2012 in the case of Norberto Monsalve Bedoya.

28. The Working Group decides to transmit this case to the Special Rapporteur on the question of torture.

[*Adopted on 26 August 2013*]